Choo Cheng Liew (representative of the estate of Sunny Yap Eu Leong, deceased) v Public Prosecutor

FEDERAL COURT (KUALA LUMPUR) — CRIMINAL REFERENCE NO 06-5-95
EUSOFF CHIN CHIEF JUSTICE, EDGAR JOSEPH JR AND WAN ADNAN FCJJ
25 SEPTEMBER 1996

Criminal Procedure *— Appeal — Abatement of appeal — Death of appellant during pendency of appeal — Composite sentence of fine and imprisonment — Whether appeal abates upon death of accused — Criminal Procedure Code (FMS Cap 6) s 320*

The deceased was convicted of the charge of corruptly accepting a gratification under s 4(a) of the Prevention of Corruption Act 1961 ('the Act') and was sentenced to a day's imprisonment and a fine of RM4,000 in default to one year's imprisonment. He was also ordered to pay a penalty of RM500 to the Government of Malaysia pursuant to s 13 of the Act which provides that the penalty shall be recoverable as a fine. He paid both the fine and the penalty. The deceased appealed against the conviction. While the appeal was still pending and before the hearing thereof had commenced, the deceased died. When the appeal came on for hearing at the High Court, upon knowledge of the death of the deceased, the deputy public prosecutor submitted that the effect of the death on the appeal was finally to abate the same having regard to s 320 of the Criminal Procedure Code (FMS Cap 6) ('the Code'). The appellate judge held that the widow of the deceased had no legal interest in the outcome of the appeal and since the fine and the penalty were paid by the deceased before his death, and without the benefit of an equivalent provision like s 70 of the Indian Penal Code, the widow had no locus standi to prosecute the appeal (see [1994] 3 MLJ 434). He further held that the clear words in bracket of the second limb in s 320 of the Code refer only to an appeal against a sentence of fine and could not be read to include a composite sentence of both imprisonment and a fine plus a penalty as in the present case. The widow of the deceased, desirous of pursuing the appeal, referred the following questions of law to the Supreme Court under s 66(1) of the Courts of Judicature Act 1964 (since repealed):

(i) whether by reason of s 320 of the Code, an appeal by an accused to the High Court from conviction and a composite sentence of fine and imprisonment passed against him by the sessions court, in respect of offences of corruptly accepting and corruptly soliciting a gratification in contravention of ss 4(a) and 3(a) respectively of the Act, finally abates on the death of the appellant during the pendency of the appeal; and

(ii) whether the legality or propriety of such composite sentence of fine and imprisonment necessarily involves an examination of the validity of the conviction itself.

Held:

(1) Appeals by the Public Prosecutor when an accused person had been acquitted pursuant to s 306 of the Code, and appeals against conviction where the only sentence imposed was that of imprisonment would abate on the death of the accused during the pendency of the appeal (see p 351E–F); *Harnam Singh v The State of HP* AIR 1975 SC 236 followed.

(2) The rule of abatement of criminal appeals contained in s 320 of the Code would not apply to appeals from a sentence of fine or a composite order of sentence combining the substantive imprisonment with fine (see p 351G); *Harnam Singh v The State of HP* AIR 1975 SC 236 followed.

(3) When considering appeals which survived notwithstanding the death of the accused during their pendency, the legality or propriety of the sentence of fine was, of course, open to challenge and consequently, the validity of the conviction was also open to challenge. It followed that if the conviction was unsustainable, the sentence, whatever it may be, would have to be set aside (see p 351H); *Harnam Singh v The State of HP* AIR 1975 SC 236 followed.

[Bahasa Malaysia summary

Si mati telah disabitkan pertuduhan menerima suapan secara rasuah di bawah s 4(a) Akta Pencegahan Rasuah 1961 ('Akta tersebut') dan dijatuhkan hukuman pemenjaraan selama sehari dan denda sebanyak RM4,000 dan jika ingkar hukuman pemenjaraan setahun. Dia juga diperintahkan supaya membayar penalti RM500 kepada Kerajaan Malaysia menurut s 13 Akta tersebut yang memperuntukkan bahawa penalti haruslah boleh didapat balik sebagai denda. Dia telah membayar kedua-dua denda dan penalti. Si mati telah merayu terhadap sabitan. Ketika rayuan masih menunggu penyelesaian dan sebelum pembicaraan rayuan bermula, si mati telah meninggal dunia. Apabila rayuan dibicarakan di Mahkamah Tinggi, setelah kematian si mati diketahui, penolong pendakwa raya berhujah bahawa akibat kematian ke atas rayuan adalah bahawa rayuan diberhentikan secara muktamad memandangkan s 320 Kanun Prosedur Jenayah (NMB Bab 6) ('Kanun tersebut'). Hakim rayuan memutuskan bahawa balu si mati tidak mempunyai kepentingan undang-undang dalam keputusan rayuan dan oleh kerana denda dan penalti telah dibayar oleh si mati sebelum kematiannya, dan tanpa manfaat suatu peruntukan yang setara seperti s 70 Kanun Keseksaan India, balu si mati tidak mempunyai locus standi untuk bertindak atas rayuan (lihat [1994] 3 MLJ 434). Beliau selanjutnya memutuskan bahawa perkataan-perkataan yang jelas dalam kurungan bahagian kedua s 320 Kanun tersebut hanya merujuk kepada rayuan terhadap hukuman denda dan tidak boleh dibaca sebagai meliputi hukuman komposit pemenjaraan dan denda serta penalti seperti dalam kes ini. Balu si mati, yang ingin meneruskan rayuan, merujukkan persoalan undang-undang yang berikut kepada Mahkamah Agung di bawah s 66(1) Akta Mahkamah Kehakiman 1964 (kini dimansuhkan):

A (i) sama ada melalui s 320 Kanun tersebut, suatu rayuan oleh seseorang tertuduh kepada Mahkamah Tinggi daripada sabitan dan hukuman komposit denda dan pemenjaraan yang dijatuhkan terhadapnya di mahkamah sesyen, berkenaan dengan kesalahan menerima dan memujukrayu suapan secara rasuah bertentangan dengan ss 4(a) dan 3(a) masing-masing Akta tersebut, berhenti secara muktamad atas kematian perayu sementara menunggu penyelesaian rayuan; dan

B (ii) sama ada kesahan atau kesesuaian hukuman komposit denda dan pemenjaraan demikian perlu membabitkan pemeriksaan atas kesahan sabitan tersebut.

C **Diputuskan:**

(1) Rayuan oleh Pendakwa Raya apabila seorang tertuduh telah dibebaskan menurut s 306 Kanun tersebut, dan rayuan terhadap sabitan di mana satu-satunya hukuman yang dikenakan adalah pemenjaraan akan diberhentikan atas kematian tertuduh semasa menunggu penyelesaian rayuan (lihat ms 351E–F); *Harnam Singh v The State of HP* AIR 1975 SC 236 diikut.

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(2) Rukun pemberhentian rayuan jenayah yang termaktub dalam s 320 Kanun tersebut tidak terpakai kepada rayuan daripada hukuman denda atau suatu perintah hukuman komposit yang menggabungkan pemenjaraan substantif dengan denda (lihat ms 351G); *Harnam Singh v The State of HP* AIR 1975 SC 236 diikut.

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(3) Ketika mempertimbangkan rayuan yang masih wujud tanpa mengira kematian tertuduh sementara menunggu penyelesaian, kesahan atau kesesuaian hukuman denda tentunya terbuka kepada cabaran dan ekoran itu, kesahan sabitan juga terbuka kepada cabaran. Ini bermakna bahawa jika sabitan tidak boleh kekal, hukuman, dalam apa bentuk pun, harus diketepikan (lihat ms 351H); *Harnam Singh v The State of HP* AIR 1975 SC 236 diikut.

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Notes

For cases on criminal appeals, see 5 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 109–446.

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Cases referred to

Harnam Singh v The State of HP AIR 1975 SC 236 (folld)
Yap Eu Leong Sunny v PP [1994] 3 MLJ 434 (refd)

Legislation referred to

I

Courts of Judicature Act 1964 s 66(1)
Courts of Judicature (Amendment) Act 1995 s 11
Criminal Procedure Code (FMS Cap 6) ss 306, 320
Interpretation Acts 1948 and 1967 s 30
Penal Code (FMS Cap 45) s 283(1)(g)
Prevention of Corruption Act 1961 ss 3(a), 4(a),13

Code of Criminal Procedure Code 1973 s 394 [India] A
Criminal Procedure Code (V of 1898) s 431 [India]
Penal Code s 70 [India]

Reference from: Criminal Appeal No 51–458–92 (High Court, Taiping) B

Ranjit Singh (*JS Olikh* with him) (*Ranjit Singh & Co*) for the appellant.
Zulkifli bin Bahal (Deputy Public Prosecutor) for the respondent.

Edgar Joseph Jr FCJ (delivering the grounds of judgment of the court): This reference under s 66(1) of the Courts of Judicature Act 1964 came C before us on 30 July 1996, for the determination of the following questions of law:

(1) Whether by reason of s 320 of the Criminal Procedure Code (FMS Cap 6) ('the Code'), an appeal by an accused to the High Court from conviction and a composite sentence of fine and D imprisonment passed against him by the sessions court, in respect of offences of corruptly accepting and corruptly soliciting a gratification in contravention of ss 4(a) and 3(a) respectively of the Prevention of Corruption Act 1961 ('the Act'), finally abates on the death of the appellant during the pendency of the appeal?

(2) Whether the legality or propriety of such composite sentence of fine E and imprisonment necessarily involves an examination of the validity of the conviction itself?

At the outset, we have to point out that s 66 of the CJA was repealed by the Courts of Judicature (Amendment) Act 1995 s 11, but the repeal does F not affect the present reference by reason of s 30 of the Interpretation Acts 1948 and 1967.

The background facts which gave rise to this reference may be shortly stated:

The accused Sunny Yap Eu Leong ('the deceased'), a settlement G officer, had first appeared on 18 December 1989, before the sessions court judge at Kuala Kangsar, when he was charged with two offences of corruptly accepting and corruptly soliciting a gratification in contravention of ss 4(a) and 3(a)(ii) respectively, of the Act. He claimed trial to both charges.

In due course, his case was heard and after a series of broken H hearings ending on 5 September 1992, when the defence closed its case and final submissions were heard, the sessions judge convicted the deceased of the charge of corruptly accepting a gratification but acquitted him of the soliciting charge. The sentence passed against him in respect of the offence of accepting a gratification, was a day's imprisonment and a fine of I RM4,000 in default to one year's imprisonment. He was also ordered to pay a penalty of RM500 to the Government of Malaysia pursuant to s 13 of the Act which provides that the penalty shall be recoverable as a fine. He paid both the fine and the penalty. Both the deceased and the Public

A Prosecutor appealed, the former against conviction and the latter against the sentence as being manifestly inadequate.

On 14 December 1993, the Public Prosecutor withdrew his appeal against sentence so that what remained was the appeal against conviction by the deceased.

B In the event, on 21 November 1993, while the appeal was still pending and before the hearing thereof had commenced, the deceased died.

Some 17 months later, more particularly, on 17 February 1994, when the appeal came on for hearing at the High Court at Taiping, the C widow of the deceased Choo Cheng Liew informed the learned appellate judge in open court of the death of her husband, whereupon the deputy public prosecutor submitted that the effect of the death on the appeal was finally to abate the same having regard to s 320 of our Code which provides:

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> 320 Every appeal under s 306 shall finally abate on the death of the accused, and every other appeal under this chapter (except an appeal against a sentence of fine) shall finally abate on the death of the appellant.

In a long and careful judgment, the learned appellate judge discussed Indian and English case law (see *Yap Eu Leong Sunny v PP* [1994] 3 MLJ E 434). As regards the Indian cases which were cited by counsel, he said this (at pp 439I–440B):

> The three Indian cases referred by the learned counsel for the widow were decided in the context of s 70 of the Indian Penal Code and certainly could not and should not be adopted when interpreting s 320 of the CPC. Our F Malaysian Penal Code do not have the equivalent of s 70 of the Indian Penal Code. These three Indian cases show a singular principle in that the representative of a deceased convicted person cannot be allowed to appeal unless he could show a legal interest as opposed to a 'sentimental interest', for example, clearing the name of the convicted person; the exception is in the case of a sentence of fine. In India, where the appeal is against fine, the G appeal may be permitted to be continued by the legal representatives of the deceased appellant. In India too, in the case of imprisonment, the sentence does not affect the property of the deceased accused and so the appeal abates upon his death (*Gajapathi Rao v State of Andhra Pradesh* AIR 1964 SC 1645).

H As regards the English cases, his Lordship said this (at p 440C–H):

> On the other end of the scale, under the English law, a fine is in the nature of a monetary penalty which is due to the Crown, and when a man is sentenced to pay a fine, there at once arises a debt of record (that is, by judgment) to the Crown. Thus, where an accused was sentenced to imprisonment and fine and the sentence also provided for imprisonment in I default of payment of fine, and when the accused died while serving the imprisonment without paying the fine, it was held that the fine could be recovered by the Crown from the personal representatives of the accused even after his death (*HM Treasury v Harris* [1957] 2 All ER 455). In *Hodgson v Lakeman* [1943] 1 KB 15, a fine of 35s was imposed on Hodgson

after the court convicted him, in his capacity as a council's clerk, for an offence committed by the Cumberland County Council for breaching the Lighting (Restrictions) Order 1940. Hodgson entered an appeal against his conviction and on his application, the justices stated a case, but he died before the appeal could be heard by the High Court. In a short judgment, Viscount Caldecote CJ held that when an appeal to the High Court against a conviction by justices has been entered but the appellant dies before it has been heard, and it appears that his executors have an interest in the appeal, the court has jurisdiction to allow the executors to prosecute the appeal. In contrast would be the case of *R v Rowe* [1955] 2 All ER 234, where Ivor Clyde Rowe was convicted at Bedford County Quarter Sessions on 18 February 1955 of false pretenses and sentenced to 18 months' imprisonment. On 21 February 1955, he gave notice of application for leave to appeal against conviction, but on the night of 6/7 March 1955, he died in prison. His widow, did not apply for leave to continue his application. Lord Goddard CJ after referring to *Hodgson v Lakeman* [1943] 1 KB 15 held that the sentence, being one of imprisonment and the prisoner having died, neither his widow nor his executors or administrators had any such legal interest as would justify the court's allowing them to continue the appeal, and accordingly the application was refused.

His Lordship then concluded (at p 440H–I):

Likewise, in the present appeal, the widow has no legal interest in the outcome of the appeal and since the fine and the penalty were paid by the deceased appellant before his death and without the benefit of an equivalent provision like s 70 of the Indian Penal Code, the widow has no locus standi to prosecute this appeal.

Finally, his Lordship said this (at p 442E–F):

Thus, the clear words in bracket of the second limb in s 320 of the CPC refer only to an appeal against a sentence of fine and cannot be read to include a composite sentence of both imprisonment and a fine plus a penalty like the present appeal. Clearly, therefore the death of the appellant brought an immediate end to his appeal.

The widow being desirous of pursuing the appeal applied for leave to do so and also to refer the questions of law hereinbefore mentioned for the determination of the Supreme Court ('the predecessor of this court'). Both applications were granted on 3 April 1995.

At the conclusion of the arguments before us, we answered the questions of law aforesaid in favour of the widow, that is to say, the first question in the negative and the second question in the affirmative, and restored the appeal for hearing on the merits before the High Court at Taiping. We intimated then that we would give our reasons later.

With respect, the learned appellate judge was in error when he held that there was no equivalent in our laws to s 70 of the Indian Penal Code. Section 283(1)(g) of our Code is, indeed, in pari materia with s 70 of the Indian Penal Code for it provides:

283 (1) Where any fine is imposed under the authority of any law for the time being in force, then, in the absence of any express provision

A relating to such fine in such law contained, the provisions following shall apply (that is to say) —

(g) the fine, or any part thereof which remains unpaid, may be levied at any time within six years after the passing of the sentence, and if under the sentence the offender be liable to imprisonment for a longer period than six years then at any time
B previous to the expiration of that period, and the death of the offender does not discharge from the liability any property which would after his death be legally liable for his debts.

Had the learned appellate judge not misdirected himself as aforesaid, he would undoubtedly have regarded Indian case law as persuasive since
C s 431 of the Indian Criminal Procedure Code (V of 1898) (repealed and replaced by s 394 of the Code of Criminal Procedure 1973), is equivalent to s 320 of our Code which provides:

320 Every appeal under s 306 shall finally abate on the death of the accused, and every other appeal under this chapter (except an appeal
D against a sentence of fine) shall finally abate on the death of the appellant.

Section 306 of our Code provides:

306 When an accused person has been acquitted by a magistrate there shall be no appeal except by, or with the sanction in writing of, the
E public prosecutor.

In our view, the effect of s 320 of our Code may be stated thus: The following appeals to the High Court abate on the death of the accused during the pendency of the appeal:

F (1) appeals by the Public Prosecutor when an accused person has been acquitted pursuant to s 306 of our Code; and

(2) appeals against conviction where the only sentence imposed is that of imprisonment.

The rule of abatement of criminal appeals contained in s 320 of our Code
G does not apply to appeals from a sentence of fine or a composite order of sentence combining the substantive imprisonment with fine.

When considering appeals which survive notwithstanding the death of the accused during their pendency, the legality or propriety of the sentence of fine is, of course, open to challenge and consequently, the validity of the conviction is also open to challenge. It follows that if the
H conviction is unsustainable, the sentence, whatever it may be, would have to be set aside.

In enunciating the above principles, we gratefully acknowledge the assistance we have derived from the judgment of Chandrachud J (as he then was) in *Harnam Singh v The State of HP* AIR 1975 SC 236, which is
I precisely in point.

Order accordingly.

Reported by Loo Lai Mee